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Supreme Court, U.S.
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No. 04-792

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2004

HAROLD E. CARTER, WARDEN
Petitioner,

-vs-

DAVID B. CLINKSCALE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a state criminal defendant exhausts a claim of trial counsel ineffectiveness when he raises that claim in his direct state appeal but the state appellate court, consistent with this Court's reasoning in *Massaro v. United States*, 538 U.S. 500 (2003), declines to rule on the claim because the appellate record is inadequate to allow a ruling on that claim.

2. Whether the state courts have sufficiently complied with the clear-and-express statement rule set forth in *Harris v. Reed*, 489 U.S. 255 (1989), when a state trial court denies a motion to excuse the procedural default, when the state appellate court affirms that denial, and when the federal appellate court concedes that the state courts did not reach the merits of the federal claim.

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ARGUMENT

I. Raising a claim of trial counsel ineffectiveness on direct appeal cannot be deemed "exhaustion of state remedies" for federal habeas corpus purposes when the state appellate court declines to rule on that claim due to an inadequate appellate record.

II. When a state trial court enforces a state procedural bar, when a state appellate court affirms the trial court's order enforcing that bar, and when the state courts do not reach the merits of the federal claim, then the state courts have sufficiently complied with the clear-and-express statement rule of *Harris v. Reed*, 489 U.S. 255 (1989).

Both questions presented still warrant review. In response to Clinkscale's brief in opposition, petitioner adds the following regarding the first question presented.

A.

Clinkscale asserts that the direct appeal record *was* sufficient to allow the state appeals court to rule upon the alibi/ineffectiveness issue. However, this fact-bound response implicitly concedes a key point. Clinkscale implicitly concedes that it is important whether the direct appeal record was adequate to allow the state appeals court to address the alibi/ineffectiveness claim.

The Sixth Circuit majority engaged in no such analysis of this specific appellate record to decide whether the appellate record was adequate to address the alibi/ineffectiveness claim. Indeed, the Sixth Circuit majority implicitly decided that the appellate record had *not* been adequate, since it relied heavily on post-appeal affidavits and on a defense investigator's report in deciding the merits. None of these materials had been available to the state appellate court on direct appeal. Instead of making a careful assessment of appellate-record adequacy, the Sixth Circuit majority blew right past the issue of adequacy.

even saying "there were no special limitations on the ability of the Ohio Court of Appeals to reach the merits of that claim." *Clinkscale v. Carter*, 375 F.3d 430, 440 (6th Cir. 2004).

Even Clinkscale apparently would concede that there *are* special limitations on a state appellate court's ability to address claims of trial counsel ineffectiveness. These limitations are tied to the adequacy of the appellate record. To "exhaust" an ineffectiveness claim on direct appeal, a defendant must base that claim on an appellate record that would allow the state appellate court to make a full ruling on the merits.

This Court can reverse on the ground that the Sixth Circuit majority missed an important required step in the exhaustion analysis. This Court then can remand for the Sixth Circuit to conduct the careful review of the state appellate record that it should have conducted in determining whether the state appellate record had been adequate to allow the state appellate court to rule on the alibi/ineffectiveness issue.

B.

Clinkscale claims that his raising of the alibi/ineffectiveness issue on direct appeal must be deemed sufficient to exhaust that issue in the Ohio courts because, if he had not raised the issue there, Ohio courts would have treated the issue as barred by *res judicata* in state post-conviction review. But the state-law *res judicata* issue raises the same key question as the exhaustion issue: was the appellate record sufficient to allow a ruling on the issue on direct appeal? *Res judicata* will apply to bar a trial counsel ineffectiveness claim on post-conviction review only if "said issue could fairly have

been determined [on direct appeal] without resort to evidence *dehors* the record * * *." *State v. Cole*, 2 Ohio St.3d 112, 443 N.E.2d 169 (1982) (syllabus); see also *State v. Cooperrider*, 4 Ohio St.3d 226, 228, 448 N.E.2d 452, 454 (1983) ("when the trial record does not contain sufficient evidence regarding the issue of competency of counsel, an evidentiary hearing is required to determine the allegation."; "This procedure is through the post-conviction remedies * * *.").

There is no absolute rule requiring that Ohio defendants raise alibi/ineffectiveness claims on direct appeal. The viability of such a claim on direct appeal depends on the adequacy of the appellate record. In a fair number of cases, including the leading case of *State v. Smith*, 17 Ohio St.3d 98, 477 N.E.2d 1128 (1985), Ohio courts have recognized that the alibi/ineffectiveness issue is raisable in post-conviction review. *State v. Pierce*, 127 Ohio App.3d 578, 585, 713 N.E.2d 498, 502 (1998) (defendant presenting evidence outside original trial court record; issue raisable in post-conviction review); *State v. Ward*, 85 Ohio App.3d 537, 541, 620 N.E.2d 168, 171 (1993) ("impossible" on direct appeal to determine issue); *State v. Schlee*, 1998 Ohio App. Lexis 6363, 1998 WL 964291 (1998) (*res judicata* did not bar post-conviction review).

The state-law *res judicata* issue should not deter this Court from granting certiorari. The issue of whether *res judicata* exists under Ohio law merely mimics the analysis that should occur under the exhaustion doctrine for habeas purposes. If the direct appeal record was adequate to allow review, then the direct appeal was the correct place to raise the alibi/ineffectiveness issue, and that issue would be deemed exhausted because it was fairly presented in the state courts. If the direct appeal record was inadequate, then no "fair

presentation" occurred on direct appeal, and the alibi/ineffectiveness claim would not have been barred by *res judicata* in Ohio post-conviction review. Under both the exhaustion doctrine and the state-law *res judicata* doctrine, the adequacy of the appellate record controls, but the Sixth Circuit majority simply missed that important step in the analysis.

C.

Clinkscale's arguments on appellate-record adequacy lack merit for other reasons. Based on Ohio cases, including *State v. Smith*, *supra*, Clinkscale tries to make appellate-record adequacy turn on the issue of counsel's knowledge. According to Clinkscale, if the record does not include information that counsel had knowledge of the alibi witnesses, then direct appeal review will be inappropriate and post-conviction litigation will be allowed. See Brief in Opposition, at 6 & n. 3. But if the appellate record shows knowledge on counsel's part, then Clinkscale contends that the appellate court can find that counsel was ineffective.

This oversimplified analysis does not withstand scrutiny, including the flawed citation to *Smith*. In *Smith*, the trial court had excluded the alibi evidence, and the defense claimed trial counsel ineffectiveness on direct appeal. The court rejected the notion that the failure to file a notice of alibi constitutes *per se* ineffectiveness. The court also found indications that "counsel's noncompliance was an intended, self-serving trial tactic" and that "there is some indicia of proof that the alibi evidence was withheld from the prosecution in bad faith, as a planned trial tactic." 17 Ohio St.3d at 101, 477 N.E.2d at 1131.

The court also discussed the possibility that the criminal defendant himself may have approved this planned tactic:

> Counsel is required to consult with his client on important trial decisions. The record is devoid of any suggestion that counsel failed to communicate this tactic to the appellee. Thus, we assume that the appellee chose to disregard the notice-of-alibi rule, having the potential concomitant effect of depriving the state of a fair trial. * * *

Id. at 101 n. 1, 477 N.E.2d at 1131 n. 1. Despite these repeated references to intent, planning, and bad faith, the Ohio Supreme Court concluded that the alibi/ineffectiveness issue would be raisable in post-conviction review. *Id.* ("appellee is entitled to pursue the matter by means of postconviction relief").

As in *Smith*, indicia of knowledge and bad faith here raise more uncertainties about what occurred. Defense counsel here had ample opportunity to meet with the defendant and therefore presumably knew of the "alibi." In the words of the trial court, the "alibi" was "unsophisticated," but the simple nature of the "alibi" naturally begged the question of why counsel would have failed to file the simple alibi notice. Clinkscale's trial counsel claimed in the trial court that the notice was delayed because "we did not have verification from the investigator until the very last moment." Trial counsel did not say what factors prompted the perceived need for "verification."

Adding to the uncertainty was the Ohio trial court's conclusion that bad faith likely prompted the late notice:

> I think we do have bad faith here in the sense that I have been offered no reason whatsoever as to why this alibi could not have been timely filed. Absolutely none. The defense's only response is that the investigator just verified it a couple days ago after trial started. I don't accept that as a valid reason because the alibi would be very simple to verify * * *.

The trial court's concerns about bad faith were not far fetched. As this Court has stated in the context of defense discovery violations:

> One of the purposes of the discovery rule itself is to minimize the risk that fabricated testimony will be believed. Defendants who are willing to fabricate a defense may also be willing to fabricate excuses for failing to comply with a discovery requirement. The risk of a contempt violation may seem trivial to a defendant facing the threat of imprisonment for a term of years. A dishonest client can mislead an honest attorney, and there are occasions when an attorney assumes that the duty of loyalty to the client outweighs elementary obligations to the court.

Taylor v. Illinois, 484 U.S. 400, 413-14 (1988). It is "reasonable to presume that there is something suspect about a defense witness who is not identified until after the 11th hour has passed." *Id.* at 414. Defense discovery violations are sometimes "willful and motivated by a desire to obtain a tactical advantage that would minimize the effectiveness of cross-examination and the ability to adduce rebuttal evidence * * *." *Id.* at 415.

On the then-extant appellate record, the Ohio Court of Appeals could not be certain what had happened. Counsel's proffered "verification" excuse was suspect, and the excuse raised its own questions about what had prompted the need for "verification." Counsel did not even provide an exact date as to when Clinkscale had given the attorneys information about the "alibi," only saying at one point that the date of disclosure was "not * * * yesterday." In large measure, counsel's statements were cryptic on the "alibi" issue and coy about what prompted the late filing of the notice of alibi.

Moreover, given the indications of "bad faith," the concerns raised in *Smith* naturally arose. The Ohio Court of Appeals in fact quoted from *Smith* extensively, including the language of *Smith* indicating that the criminal defendant may have approved of the late-notice strategy. The appellate court quoted from *Smith* that the issue was a matter for post-conviction proceedings. *State v. Clinkscale*, 1999 Ohio App. Lexis 6453, *14-20, 2000 WL 775607 (1999).

The appellate record was uncertain in other respects as well. While the untimely notice of alibi set forth that Clinkscale had been present at the home of Bryan Fortner and then at the home of his parents, the notice was conclusory as to how Fortner, Rhonda Clark, and Arthur Clinkscale would support the alibi, since the notice only said that they would "substantiate[]" the alibi. Since no detailed proffer was made of their testimony, the appellate court would have been unable to ascertain how strongly or weakly they would "substantiate" the alibi that respondent Clinkscale testified to at trial. While Clinkscale notes that the defense investigator's report had been provided to the prosecution, the report was not proffered to the

trial court and therefore was not available in the appellate record. As a result, the appellate court would not have been able to assess questions of counsel competence or prejudice.

In the final analysis, the appellate court had before it coyly-worded statements that disclosed little detail about how the "alibi" witnesses would testify or why the alibi had been withheld. With this much uncertainty, and with the danger that the defense had engaged in a bad-faith effort to sandbag the prosecution (with or without Clinkscale's consent), see *Smith*, and with the cloak of secrecy afforded the defense by the attorney-client privilege, see *Taylor*, 484 U.S. at 418, the Ohio Court of Appeals acted properly in concluding that it could not rule upon the alibi ineffectiveness issue on direct appeal.

D.

Clinkscale correctly asserts that *Massaro* is not a constitutionally-mandated decision. *Massaro* holds that a federal criminal defendant need not ever raise a claim of trial counsel ineffectiveness on direct appeal in order to preserve it for post-conviction review under 28 U.S.C. § 2255. This categorical holding is limited to federal prosecutions, and therefore Ohio is not bound to adopt a similar rule. Ohio can still require defendants in some cases to raise the issue of trial counsel ineffectiveness on direct appeal because in some cases the appellate record will be adequate to address such issues.

The question presented here is different. Although Ohio requires some defendants to raise the ineffectiveness claim on direct appeal when the appellate record would allow a fair determination, Ohio is also allowed to require other

criminal defendants to proceed through post-conviction remedies when the direct appeal record is inadequate.

Consistent with the reasoning of *Massaro*, the Ohio Court of Appeals concluded that it could not rule on the alibi/ineffectiveness claim on direct appeal. Ohio need not adopt *Massaro*'s categorical holding *in toto* to see that *Massaro*'s discussion of general unreviewability makes perfect sense in the large number of cases where the direct appeal record is inadequate to allow the appellate court to make a definitive ruling.

Clinkscale briefly refers to the fact that his time for seeking post-conviction relief had expired under Ohio law by the time the Ohio appellate court said he should proceed through post-conviction proceedings. But Clinkscale's failure to seek timely post-conviction relief does not detract from the fact that the direct appeal record had been inadequate. Clinkscale should have filed a timely post-conviction petition while the appeal was pending. He should have allowed for the distinct possibility that the appellate court would decline to rule. His failure to do so is his own procedural default.

E.

Despite the Sixth Circuit's efforts to contend that the warden failed to sufficiently argue lack of exhaustion, the fact remains that the issue was raised in the Sixth Circuit, and the Sixth Circuit correctly ruled that the issue had not been waived. Moreover, the only reason the warden did not claim lack of exhaustion in the district court was because the warden was urging the issue of procedural default. When a claim is

procedurally defaulted, it is "exhausted" because it is no longer raisable in the state courts.

On the specific point of whether the alibi/ineffectiveness claim had been exhausted on direct appeal, the warden argued that "the Court of Appeals was correct when it determined that the claim was not properly presented in the direct appeal because the claim necessarily relied on evidence outside the record." See Answer/Return of Writ, at 18. The magistrate *agreed* with the warden on this specific point. See Report and Recommendation, at 25 n. 2. Even if the question of exhaustion could be waived, it was not waived here.

CONCLUSION

In light of the foregoing, petitioner respectfully requests that this Court grant the petition for writ of certiorari.

Respectfully submitted,

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